IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

NORTHLAND PROMONTORY II, LLC, Plaintiff/Appellant, v. CITY OF TUCSON, a municipal corporation, Defendant/Appellee.	2 CA-CV 2007-0048 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. C-226041

Honorable Charles V. Harrington, Judge

AFFIRMED

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H O W A R D, Presiding Judge.

¶1 Appellant Northland Promontory II, LLC, challenges the trial court's order denying Northland's application to enforce a 1986 judgment against appellee City of Tucson after the City changed its zoning ordinances. Northland argues the judgment remains valid and enforceable against the City. Concluding the judgment did not permanently prevent the City from enacting valid conditions generally applicable to all developments, we affirm.

Background

¶2 The facts necessary to resolve this appeal are essentially undisputed. In 1986, Ridgebrook, Northland's real property predecessor in interest, brought a special action complaint against the City seeking to compel the City to approve a development plan for construction of apartments on a parcel of land Ridgebrook owned in Tucson. It alleged the City had imposed a series of unreasonable and illegal conditions on its development of the parcel. After a three-day trial to the court, the parties apparently reached a settlement, allowing judgment to be taken against the City.[1] The judgment included a writ of mandamus stating that the City had "acted without or in excess of its jurisdiction and legal authority" by attempting to impose certain conditions on the development. It ordered the City to approve a development plan for the property and expressly provided that the development plan would be "deemed to . . . comply with all of the provisions of the Tucson Zoning Code and all other applicable regulations, ordinances or statutes of the city as they may now *or*

[1]Although the judgment provides that the parties stipulated that Ridgebrook's request for findings of fact and conclusions of law would be withdrawn, neither the judgment nor the record before us expressly provides that the parties reached a settlement. Nevertheless, Northland asserts that the parties settled the case, and the City does not dispute that assertion. We will therefore assume that there was a settlement.

may hereafter exist." (Emphasis added.) It also ordered the City to approve a grading plan as well as other plans for the property, so long as they substantially conformed to the development plan.

¶3 Shortly after the judgment was entered, Ridgebrook submitted a development plan for the entire site, which the City approved. Ridgebrook then submitted construction documents to develop part of the parcel ("Phase I"), which the City also approved, and Ridgebrook completed construction of Phase I. It did not, however, develop the remainder of the parcel ("Phase II").

¶4 In 1994, RST Limited Partnership bought the undeveloped property and sought to develop Phase II. It submitted a grading plan that included modifications to comply with federal standards, and the City approved it. But RST ultimately did not go forward with Phase II of the development.

¶5 In 1995, the City replaced its Zoning Code, which, in 1986, apparently had provided no expiration date for approved development plans, with the Land Use Code. The Land Use Code provides that "an approved development plan remains valid for a period of one (1) year from the date of approval." City of Tucson Land Use Code § 5.3.8.2(B). In 2006, Northland, the current owner of the remaining undeveloped property,[2] sought to

[2]Northland stated below and here that it acquired the undeveloped property from RST. It does not, however, assert that Ridgebrook assigned its rights under the 1986 judgment to RST, or that RST assigned those rights to Northland. Thus, Northland has failed to demonstrate that it is entitled to enforce the judgment. *See* 30 Am. Jur. 2d *Executions & Enforcement of Judgments* § 8 (enforcement of judgment by nonparty requires proper assignment of judgment). But the City did not argue below or here that Northland was not entitled to bring this action and has waived any such claim. *See Carrillo*

develop Phase II and submitted a revised grading plan to the City, which it contends substantially conformed to the 1986 development plan.[3] The City rejected the plan, concluding the 1986 development plan had expired under the Land Use Code. Northland then filed an application for an order to show cause why the 1986 judgment should not be enforced, requiring the City to approve the grading plan. After hearing the arguments of counsel, the trial court denied Northland's application and granted the City's motion to quash the order to show cause. Northland then appealed.

Jurisdiction

¶6 We address first the City's contention that Northland sought to have the City held in contempt under A.R.S. § 12-864 and that this court therefore lacks jurisdiction over the appeal. When a judgment requires performance of an act, it "may be enforced by the court by the power to punish for contempt." A.R.S. § 12-1556. Section 12-864 governs "contempts committed by failure to obey a lawful . . . judgment of the court." Contempt adjudications under § 12-864 are not appealable, *Pace v. Pace*, 128 Ariz. 455, 456-57, 626 P.2d 619, 620-21 (App. 1981), although they are reviewable by special action in the

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v. State, 169 Ariz. 126, 132, 817 P.2d 493, 499 (App. 1991) ("Issues not clearly raised and argued on appeal are waived.").

[3]Northland contends the City conceded below that the revised grading plan substantially conforms to the 1986 development plan. The City, on the other hand, contends that it simply did not review the grading plan because it did not consider the 1986 development plan to be valid. In light of our disposition of this case, we need not address this issue.

appropriate circumstances. *See Danielson v. Evans*, 201 Ariz. 401, ¶ 35, 36 P.3d 749, 759 (App. 2001).

¶7 As the City notes, Northland sought to have the City held in contempt as part of its application for order to show cause. But the trial court did not actually hold the City in contempt. And contempt was not the only relief Northland sought; it also sought enforcement of the 1986 judgment.

¶8 Division One of this court has addressed and rejected a jurisdictional challenge under similar circumstances. In *In re Maricopa County Juvenile Action No. JD-05401*, 173 Ariz. 634, 636-37, 845 P.2d 1129, 1131-32 (App. 1993), a dependency action, a child's paternal and maternal grandparents had stipulated to a custody arrangement. When the maternal grandparents later believed the paternal grandparents were not complying with the stipulation, they filed a "Petition for Order to Show Cause in re Enforcement of Order and Contempt." *Id.* The trial court dismissed that petition. *Id.* at 638, 845 P.2d at 1133. On appeal, the court rejected the paternal grandparents' argument that the court lacked jurisdiction because the order was an adjudication of contempt. *Id.* The court noted that, despite the petition's title, it was in substance an attempt to change the custody arrangement under the terms of the original stipulated order. *Id.* And, because the new custody order entered by the trial court was final, it was appealable. *Id.* at 638-39, 845 P.2d at 1133-34.

¶9 The procedure in this case was similar. Although the application for order to show cause sought, in part, to have the City held in contempt, it was in substance an attempt

to have the 1986 judgment declared currently valid and enforceable. Thus, the request for a contempt citation does not deprive this court of jurisdiction.

¶10 The City relies on the statement in *Elia v. Pifer*, 194 Ariz. 74, ¶ 30, 977 P.2d 796, 802 (App. 1998), that "orders adjudicating whether a person should be held in contempt for refusing to obey a court order are not appealable in Arizona." But *Elia* is factually distinguishable because, there, the court was discussing a prior order in which a court had actually held Elia in contempt. *Id*. ¶¶ 25-26. Here, as discussed above, there was no contempt order. And the court here adjudicated more than simply whether the City should be held in contempt; it decided that the judgment was no longer enforceable.

¶11 Moreover, the rationale behind prohibiting appeals from contempt adjudications does not apply here. Contempt orders are not appealable because the appeal should be from the initial judgment, and enforcement of a judgment from which no party appeals should not be delayed by the contempt appeal. *Id.* ¶ 30; *see also Herzog v. Reinhardt*, 2 Ariz. App. 103, 104, 406 P.2d 738, 739 (1965). But in this case, enforcement of the judgment is not being delayed by the appeal. Rather, the trial court concluded the judgment was no longer enforceable. And the precise issue raised here involves the enforceability of the 1986 judgment after the passage of a significant amount of time and the City's adoption of the Land Use Code, which obviously could not have been raised on appeal from the underlying judgment. Accordingly, we do not lack jurisdiction merely because Northland sought in part, and unsuccessfully, to have the City held in contempt.

¶12 Additionally, we agree with Northland that we have jurisdiction under A.R.S. § 12-2101(C), which provides for an appeal from a special order made after final judgment.

> To be appealable, a special order after judgment must raise different issues than those that would be raised by appealing the underlying judgment; it must affect the underlying judgment, relate to its enforcement, or stay its execution; and it must not be "merely 'preparatory' to a later proceeding that might affect the judgment or its enforcement."

In re Marriage of Dorman, 198 Ariz. 298, ¶ 3, 9 P.3d 329, 331 (App. 2000), *quoting Arvizu v. Fernandez*, 183 Ariz. 224, 227, 902 P.2d 830, 833 (App. 1995), *quoting Lakin v. Watkins Assoc. Indus.*, 863 P.2d 179, 184 (Cal. 1993).

¶13 The City argues that the issue raised here could have been raised on appeal from the underlying judgment. But, as noted above, the issue here, triggered by the City's rejection of a grading plan in 2006, could not have been raised in an appeal from the original judgment. Additionally, the appeal relates to the enforcement of the judgment, and, because the trial court found the judgment unenforceable, it is not merely preparatory to a later proceeding. Therefore, we have jurisdiction under § 12-2101(C).[4]

Enforceability of the Judgment

¶14 Northland contends the 1986 judgment remains enforceable and requires the City to approve the revised grading plan Northland submitted in 2006. The trial court concluded that "enforcement of the Judgment approximately 20 years later would be

[4]Because we conclude we have jurisdiction under § 12-2101(C), we need not address Northland's arguments that we have jurisdiction under § 12-2101(E) or that we should take special action jurisdiction.

inappropriate" given the nature of mandamus proceedings and also noted that the time periods provided in the judgment were rather short. We review the trial court's interpretation of the judgment de novo. *See Cohen v. Frey*, 215 Ariz. 62, ¶ 10, 157 P.3d 482, 486 (App. 2007); *Danielson v. Evans*, 201 Ariz. 401, ¶ 13, 36 P.3d 749, 754 (App. 2001).

¶15 "The legal operation and effect of a judgment must be ascertained by a construction of its terms." *Title Ins. Co. of Minn. v. Acumen Trading Co.*, 121 Ariz. 525, 526, 591 P.2d 1302, 1303 (1979); *see also Paxton v. McDonald*, 72 Ariz. 378, 382, 236 P.2d 364, 367 (1951). We must construe the judgment's language in light of the issues before the trial court. *See Paxton*, 72 Ariz. at 383, 236 P.2d at 367; *Cohen*, 215 Ariz. 62, ¶ 14, 157 P.3d at 487 (considering language of decree in light of "court's statutory duty"). We must determine the intention of the court, adopting the interpretation that renders the judgment "'more reasonable, effective, and conclusive,'" and that is most consistent "'with the facts and law of the case.'" *Paxton*, 72 Ariz. at 382-83, 236 P.2d at 367, *quoting* 49 C.J.S. *Judgments* § 436.

¶16 In this case, Northland's predecessor in interest sought relief from a number of unlawful conditions imposed on it by the City. It did so by filing a special action complaint seeking mandamus relief. Mandamus is appropriate "to compel, when there is not a plain, adequate and speedy remedy at law, performance of an act which the law specially imposes as a duty resulting from an office, trust or station." A.R.S. § 12-2021; *see also* Ariz. R. P. Spec. Actions 3(a). "A writ of mandamus 'is an extraordinary and expeditious

legal remedy which proceeds on the assumption that the applicant has an immediate and complete legal right to the thing demanded.'" *Rhodes v. Clark*, 92 Ariz. 31, 34-35, 373 P.2d 348, 350 (1962), *quoting State Bd. of Technical Registration v. Bauer*, 84 Ariz. 237, 240, 326 P.2d 358, 360 (1958). Because mandamus relief is limited to what the applicant is entitled to and demands, *id*., it follows that a trial court may not grant more relief than requested. *See* 52 Am. Jur. 2d *Mandamus* § 450 ("The judgment entered in a mandamus proceeding must be responsive to the issues tendered by the pleadings and to the proof, and the court, although it may grant relief for less than what is prayed for, may not grant relief for more.") (citation omitted).

¶17 Here, the judgment specifically sets forth the conditions the City had unlawfully sought to impose on Northland's predecessor:

> The City acted without or in excess of its jurisdiction and legal authority by seeking to impose the following conditions on its approval of [Northland's predecessor]'s Development Plans:
>
> A. Requiring [Northland's predecessor] to pay for or construct additional travel lanes . . . .
> B. Terminating review of the Fourth Development Plan submitted March 5, 1986, for failure to comply with the Hillside Development Zone ordinance, and requiring [Northland's predecessor] to deed a one plus acre parcel (to be used as a natural area) at the northwest corner of the Property prior to processing [Northland's predecessor]'s Development Plans. . . .
> C. Requiring [Northland's predecessor] to comply with the provisions of the Scenic Corridor Zone Ordinance.

Thus, the issue before the trial court was whether the City had sought to impose improper conditions on approval of the development plan. The court concluded the City had acted without or in excess of its jurisdiction in seeking to impose those conditions. In granting relief, the court sought to remove those conditions and require the City to approve the development plan without regard to any unlawful conditions. *See* Ariz. R. P. Spec. Actions 6 (special action "judgment may . . . direct, order, or prohibit specified action by the defendant").

¶18 Northland's predecessor did not claim it had a legal right to a development plan that would never expire. Instead, it claimed the City had imposed specific unlawful conditions on approval of its development plan. Thus, by providing that the development plan would be deemed to comply with all City ordinances "as they may now or may hereafter exist," the court intended to prevent the City from reimposing the same unlawful conditions—or imposing new unlawful conditions—on approval of the development plan. It sought to put Northland's predecessor in the same legal position that it would have been in absent the City's unlawful interference. But whether the City could many years later provide an expiration date for all development plans or impose additional general requirements on all developments was not before the court, and the judgment simply did not contemplate those questions. And Northland has not connected the City's adoption of the Land Use Code to the earlier unlawful conditions in any way.

¶19 Northland contends, however, that the trial court intended the judgment to be effective until development of the entire parcel was complete and that the language of the

judgment thus contemplated that the project could take years. But even if Northland is correct, it does not necessarily follow that the court intended to forever prevent the City from imposing on all development plans a generally applicable expiration date or other generally applicable requirements. As discussed above, Northland's predecessor had not claimed in the original action that it had a right to a development plan that would never expire, and the provision in the 1995 Land Use Code regarding expiration of development plans was not a condition imposed solely on this development. And at oral argument, Northland conceded that the Land Use Code was not improperly applied to its real property, except to the extent it violates the judgment as Northland interprets it.

¶20 Northland further notes that the judgment provides that the 1986 development plan would be deemed to comply with all ordinances "as they may now or may hereafter exist." But the specific time periods provided in the judgment—fourteen days to submit the development plan and five weeks for approval of the grading plan after submission of the grading plan—are relatively short and do not suggest the creation of perpetual rights. Thus, in the context of the surrounding language and the issues before the court, the trial court did not use "hereafter" to mean that the development plan was exempt from legitimate requirements applied years later. *See Paxton*, 72 Ariz. at 382, 236 P.2d at 367 (judgment must be construed as a whole). And, as the City notes, the word "hereafter" does not necessarily mean "forever"; instead, it "indicates direction in time." *Gordon v. Valley Nat'l*

Bank, 16 Ariz. App. 195, 198, 492 P.2d 444, 447 (1972).[5] Accordingly, we conclude the judgment did not contemplate the present situation or award perpetual development rights.

¶21 Northland also argues that the City could not legislatively defeat Northland's rights under the judgment. But we have concluded that the judgment did not grant perpetual development rights, so the City did not legislatively defeat them. Instead, it exercised its statutory authority to plan and zone the real property within its jurisdiction. *See* A.R.S. §§ 9-462 through 9-462.08. Thus, we reject this argument.

¶22 Northland last argues that the City could have requested relief from judgment under Rule 60(c), Ariz. R. Civ. P. But we have concluded that the judgment did not grant Northland's predecessor the right to an approved development plan that would never expire. The City did not need to seek relief from a remedy the judgment did not grant.

¶23 As discussed above, Northland's predecessor had sought special action relief based on a number of conditions the City attempted to unlawfully impose on approval of its development plan. But the later imposition of an expiration date on all development plans was not a condition directed at this particular property, nor was it improperly imposed. Instead, it was a generally applicable provision adopted in the Land Use Code. Therefore, as the City argues, that issue was not within the scope of relief Northland's predecessor

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[5]Northland contends the City waived any argument regarding the meaning of "hereafter" by failing to raise it below. But although the City did not cite *Gordon* or argue the definition of "hereafter" below, it did argue that the judgment could not be interpreted to be effective twenty years after it was entered. Additionally, we will affirm the trial court's ruling if it is correct for any reason. *See Forszt v. Rodriguez*, 212 Ariz. 263, ¶ 9, 130 P.3d 538, 540 (App. 2006).

sought, nor was it contemplated by the language of the judgment. In light of the issues before the court in the special action proceeding, as well as a construction of the judgment as a whole, we cannot interpret the judgment to have granted the right to an approved development plan that would never expire. Accordingly, we conclude the trial court did not err in ruling that the judgment did not require the City to approve Northland's revised grading plan.[6]

Conclusion

¶24 For the foregoing reasons, we affirm the trial court's order. Because Northland is not the prevailing party, we deny its request for attorney fees on appeal.

_____
JOSEPH W. HOWARD, Presiding Judge

CONCURRING:

_____
JOHN PELANDER, Chief Judge

_____
PETER J. ECKERSTROM, Judge

[6]Because we conclude the judgment did not permanently prevent the City from enacting conditions generally applicable to all developments, we need not address the City's remaining arguments.